Quarterly Report

of the

ATTORNEY GENERAL

of

ALABAMA

For The Period

July 1, 1961

September 30, 1961

VOLUME 104

MACDONALD GALLION, Attorney General

T. O. "Tillie" Walker

QUARTERLY REPORT

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TO THE STATE, COUNTY, AND MUNICIPAL OFFICERS OF ALABAMA:

This Quarterly Report of the Attorney General of Alabama, which includes all official opinions rendered by the Attorney General from July 1, 1961, through September 30, 1961, is published in compliance with the provisions of Title 55, Section 228, Code of Alabama 1940.

Under this section of the Code, I am required to send seven copies of this Quarterly Report to each judge of probate in the State and the judge of probate, in turn, is required to deliver one copy each to the clerk of the circuit court, the sheriff, the tax collector, the tax assessor, the county superintendent of education, and the deputy or county solicitor of his county. This section also requires that I send a copy of this report to each circuit solicitor and the chief executive officer of each incorporated municipality in the State.

The office of the Attorney General is anxious to render prompt and efficient service to the State, county, and municipal officials. If you have any suggestions to make regarding the improvement of the service, I shall be glad to hear from you.

Sincerely,

MACDONALD GALLION

Attorney General

MACDONALD GALLION
Attorney General

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OPINIONS

July 7, 1961

Honorable Taylor Wilkins

Sheriff, Baldwin County

Bay Minette, Alabama

Counties — Sheriffs

Under the authority of Act No. 593, General and Local Acts 1949, page 925, as amended by Act No. 353, Acts of 1957, page 466 (Title 54, Section 27(1) Code of Alabama 1940, Recompiled 1958) the county governing bodies of the several counties of the state are authorized, in their discretion, to purchase distinctive uniforms for the use of the sheriff of the county and his deputies in the performance of their duties, ownership to such uniforms being retained by the various counties.

Opinion by Assistant Attorney General Hardin.

Dear Sir:

Your request for an official opinion bearing date of June 19, 1961 is as follows:

"Over the years your office has issued a series of opinions to the effect that a county governing body can not purchase for the county the county sheriffs uniforms for himself and his deputies.

"Title 54, Section 27(1) Code of Alabama 1940, as amended, provides as follows:

" 'The county governing body of each of the several counties of the state may, in its discretion, and upon application of the sheriffs of the county, purchase for the use of the sheriffs **any equipment or supplies** and pay for any service performed for the sheriffs **which are reasonably necessary for the suppression of crime, the apprehension of criminals, or the proper performance of the sheriff's duties.**

" 'The county governing body of each of the several counties of the state, may, in its discretion, and upon application of the sheriff of the county, pay the sheriff's membership dues in the Alabama Sheriffs Association each year and also the sheriff's membership dues in the National Sheriffs Association each year.

" 'The cost of any such purchase, services, or membership dues, upon approval by the county governing body, may be paid out of the general fund of the county governing body.'

"The county sheriffs and deputies are to my knowledge the only law enforcement officers in the state who do not have uniforms. It is my understanding that the opinions referred to above are a series of opinions which began many years ago.

"At that time I am sure that uniforms were generally unnecessary. The changes in law enforcement problems in recent years are such that proper identification of any general police officer actually depends in a large part upon his wearing apparel.

"There are several instances which have been brought to my attention where sheriffs and deputies have either suffered physical damage or have been involved in circumstances where their person was in danger of physical violence because of the lack of a uniform.

"Previous cases show that ABC agent Thomas, from Jefferson County, was shot while working with deputies, none of whom were in uniform. At the trial the accused was acquitted when he interposed evidence showing that he had no way of knowing that officer was a law enforcement officer.

"Sheriff Luther Bozeman of Shelby County was killed by William Webb. Webb was arrested, tried and acquitted on the basis that he was attempted being stopped by a man he did not know was a peace officer.

"In the recent mob action accompanying the so called freedom riders 'passive invasion,' to our state, Sheriffs deputies without uniforms might well have been considered a part of the mob. This same conclusion would be true in any case of mob violence or riots.

"Times have changed from the day when most county residents knew the sheriff and his deputies by sight. It is my belief that many county governing bodies of this state feel that uniforms for sheriffs and sheriffs deputies 'are reasonably necessary for the suppression of crime, the apprehension of criminals or the proper performance of sheriffs duties.'

"The Alabama Sheriffs Association joins me in requesting that you reconsider the fore mentioned series of opinions and upon reconsideration render an opinion which will perimt the various county governing bodies of this state, upon a finding, that uniforms are reasonably necessary for the proper performance of the sheriffs duties, to purchase for the sheriff uniforms for him and his deputies."

In the above request you ask that I reconsider former opinions of this office holding that the county governing bodies of the several counties

of this state do not have authority, in the absence of local legislation, to purchase from county funds uniforms for the law enforcement officers of the county, particularly the sheriff and his deputies.

Any review of this matter necessitates consideration of the provisions of Act No. 593, General and Local Acts 1949, page 925, as amended by Act No. 353, Acts 1957, page 466. The provisions of this latter act are now codified as Title 54, Section 27(1), Code of Alabama 1940, Recompiled 1958. This statute is quoted in its entirety in your request for opinion.

In my opinion, proper interpretation of this statute not only permits but requires that I consider the purpose and intent of the legislature in enacting such statute. I am cognizant of the fact that prior to the adoption of Act No. 593, supra, the opinions of this office were in a hopeless state of confusion as to those items which county governing bodies of our state might properly purchase for the use of the sheriff in the performance of his duties. Any review of the opinions existing prior to such date would indicate the impossibility of any reasonable and justifiable reconciliation of same.

Under these conditions, I am of the opinion that the passage of Act No. 593, supra, represents an effort on the part of the legislature to place the matter of such purchases for the sheriff in the hands of the various county governing bodies, subject to the limitations prescribed by such act. As you will note from the verbiage of Act No. 593, as amended, supra, any purchases thereunder are discretionary on the part of the county governing body and such purchases must consist of items of equipment or supplies which are reasonably necessary for the suppression of crime, the apprehension of criminals, or the proper performance of the sheriff's duties. In my opinion, subject to these limitations, this matter now rests within the descretion of the county governing bodies of the state.

In your request you mention former opinions of this office to the effect that the above mentioned authority is not sufficient to authorize the county governing body to make purchase of uniforms for the use of the sheriff of the county and his deputies. I find that the principal opinion to this effect is a letter opinion rendered the Hon. Clarence F. Rhea, County Attorney for Etowah County, under date of May 23, 1955. This opinion construes the provisions of Act No. 593, supra, and concludes that the purchase of uniforms for the sheriff and his deputies does not come within the term "equipment or supplies" as used therein. I find that this opinion has been followed in subsequent letter opinions of this office making reference to and citing the above opinion addressed to Mr. Rhea.

Any reconsideration of the matter requested by you resolves itself into a question as to the accuracy of the conclusion reached in the opin-

ion to Mr. Rhea. Upon further consideration, and in the light of other facts and circumstances brought to my attention, I am of the opinion that the letter to Mr. Rhea is in error insofar as it concludes that the purchase of uniforms for the sheriff and his deputies is not authorized by the provisions of Act No. 593, supra, subsequently amended, as indicated herein.

I am of the opinion that the language of Act No. 593, as amended, supra, does vest in the county governing bodies of this state discretionary authority to purchase uniforms for the use of the sheriff and his deputies in the performance of their duties. In my judgment, distinctive uniforms for these law enforcement officers would constitute "equipment" within the meaning of such term as it is used in Act No. 593, as amended, supra, and that such uniforms might be properly considered to be equipment "reasonably necessary for the suppression of crime, the apprehension of criminals, or the proper performance of the sheriff's duties." In my opinion, the sight and presence of a uniformed officer quite often has a repressive effect upon the commission of crime, could materially assist in the apprehension of criminals and, undoubtedly could be of assistance to the sheriff in the proper performance of his duties. This being true, the purchase of such uniforms for the use of these officers would be legal and proper, if so authorized by the county governing body.

In general it has been stated that "equip" means to provide all that is necessary for a successful undertaking, while the term "equipment" means that which is needful or which is necessary. Also, "equipment" has been defined as the act or process of equipping with all needful supplies for any special service.—Polliak v. Smith, 88 A. 2d 351, 19 N.J. Super. 365. Treating specifically the question at hand, it has been held in the case of **Steinfeld v. Jefferson County Fiscal Court,** 229 S.W. 2d 319, 312 Ky 614 that in a statute granting the power to a county court to make and amend rules and regulations for the equipment of a county police force, the word "equipment" includes authority for the purchase of uniforms where ownership of such uniforms is retained by the county or department.

I am in accord with the statement of law cited above and, in my opinion, the county governing bodies of this state are authorized in their discretion, under the provisions of Act No. 593, as amended, supra, to purchase uniforms for the use of the sheriff of the county and his deputies, ownership of such uniforms being retained by the county.

Any opinions of this office contrary to the above conclusion are specifically overruled.

Very truly yours,

MACDONALD GALLION
Attorney General

July 11, 1961

Honorable L. D. Wall

Sheriff, Madison County

Huntsville, Alabama

Sheriffs — Costs and Fees — Convicts.

1. The Sheriff is entitled to a guard fee of $2.00 for each time a prisoner is lawfully committed to jail.

2. When the prisoner is committed under penitentiary or hard labor sentence, the sheriff is entitled to collect his fee pursuant to the provisions of Act No. 542, Acts of Alabama 1957, page 762.

3. The guard fee, pursuant to Act No. 542, is payable by submission as a part of the bill of costs to the State Comptroller. Act No. 558, Acts of Alabama 1957, page 777.

Opinion by Assistant Attorney General Webb.

Dear Sir:

Your request for an official opinion bearing date of April 9, 1959, is as follows:

"The Madison County Court was created by Act #661, Regular Session 1957, page 1003, approved September 20, 1957. This Court has final jurisdiction of all misdemeanors committed in Madison County. Appeal lies to the Circuit Court.

"A person charged with a misdemeanor, highway intoxication, public drunkenness, etc., is arrested and placed in jail. No bond is made and the prisoner taken before the Madison County Court at its next session, is convicted and sentenced to pay a fine and costs. The sentence of the Court will read approximately as follows:

"The fine and costs not being presently paid the prisoner is sentenced to jail at hard labor, ——— for payment of the fine and ——— days for payment of costs. The prisoner is committed to jail to serve the sentence.

"Guard Fees

Act #483, General Acts 1945, page 721, approved July 17, 1945; Quarterly Report of the Attorney General, Vol. 49, page 169.

"Please give me your opinion answering the following questions:

"1. Would I, as Sheriff of Madison County, be entitled to a guard fee of $2.00 for both the original commitment of the prisoner and the commitment to serve sentence following conviction. In other words, am I entitled to two guard fees?

"2. If I am entitled to two guard fees, how and from what source should the second fee, which accrues after conviction, be collected. Would it be proper for the Clerk of the Madison County Court to include this second fee in the costs assessed against the prisoner and in the hard labor cost bill sent the State or would be collected by separate claim filed either with the State or against the fine and forfeiture fund.

"Cost bills in a number of hard labor sentences are now being prepared to file with the State and I will appreciate your prompt opinion."

Question No. 1 is answered in the affirmative. The guard fee is in the nature of a turnkey allowance and the sheriff is entitled to this fee each time a prisoner is lawfully committed to jail. See Quarterly Report of Attorney General, Vol. 18, page 86, and Quarterly Report of Attorney General, Vol. 49, page 169.

Formerly, payment was made pursuant to the provisions of Act No. 483, Acts of Alabama 1945, page 721. See Quarterly Report of Attorney General, Vol. 49, page 169. However, in my opinion, payment is now further authorized under the provisions of Act No. 542, Acts of Alabama 1957, page 762, which provides in part as follows:

"In addition to the fees for the clerks payable out of the convict fund, the following shall also be paid from such funds whenever a defendant is convicted and sentenced to the penitentiary: Sheriffs fees . . . for committing prisoners to jail, two dollars; . . . ."

Act No. 542, supra, uses the word "penitentiary." However, the obvious intent of the Legislature when this Act is taken in pari materia with Act No. 61, Acts of Alabama 1957, page 100, was to include county hard labor convictions, as well as penitentiary convictions.

Paragraph 2 of Act No. 61, supra, provides as follows:

"This Act shall not be construed to relieve the Board of Correction of any responsibility imposed upon it by law to make payment for costs under Section 72, Title 45, Code of Alabama, or any other provisions of law applicable thereto."

It is therefore, my opinion that your second guard fee would be submitted to the State Comptroller (See Act No. 558, Acts of Alabama 1957) in the bill of costs pursuant to the provisions of Act No. 542, supra.

Very truly yours,

MACDONALD GALLION
Attorney General

July 19, 1961

Honorable Sam Engelhardt

Director

State Highway Department

Montgomery, Alabama

Counties — Funds — Gasoline Fund — Highways and Highway Department — Winston County — Words and Phrases.

1. Land containing gravel pits is a source of materials and supplies but does not constitute materials or supplies within meaning of an act transferring same from county to Highway Department.

2. Purchase money from sale of public lands reverts to fund from which purchased.

Opinion by Assistant Attorney General Webb.

Dear Sir:

Your request for an official opinion bearing date of May 31, 1961, is as follows:

"In the early part of the year 1957, Winston County purchased forty-six acres of 'gravel land.' Before the purchase of this land, elaborate tests were made to determine whether or not it would be suitable for use in the maintenance of county roads. The land was purchased from the Gasoline Tax fund of the county.

"Subsequent to such purchase, the Legislature vested control over the Winston County road system in the Alabama State Highway Department, provided that the State should administer the funds of the

county for county roads, and further provided in essence that all road funds, machinery, equipment, materials and supplies should be administered by the State Highway Department. This act is Act No. 111 of the 1957 Legislature.

"In May, 1961, without notice to our consultation with the Alabama State Highway Department, the governing body of Winston County sold said land to an individual. Up until the time of the sale the State Highway Department had continuously removed gravel from the gravel pit located on said land for the maintenance of Winston County roads.

"Considering the above facts together with the provisions of the 1957 Act, I would appreciate being advised as follows:

"1. Can Winston County legally sell the lands upon which this gravel pit is located so as to deprive the State Highway Department of access to and use of the essential materials located thereon for the maintenance of Winston County roads?

"2. If your answer to the above is in the affirmative, since the land was purchased from the Gasoline Tax fund, must the proceeds of the sale by Winston County be paid over for deposit to the present Gasoline Tax fund administered by the State Highway Department for the use and benefit of roads in Winston County."

The answer to your first question is in the affirmative. Although gravel actually separated from a gravel pit would, of course, constitute materials and supplies within the meaning of Section 4 of Act No. 111, Acts of Alabama 1957, page 148 (**See Union Indemnity Company v. Handley**, 220 Ala. 292, 124 So. 876, and **United States Fidelity and Guaranty Company v. Benson Hardware Company**, 222 Ala. 429, 132 So. 622), in my opinion, land containing a gravel pit is a source of materials and supplies but does not actually constitute materials or supplies in and of itself. It is, therefore, my opinion that the county may sell or otherwise dispose of the lands, even though it deprives the State Highway Department of access to and use of the essential materials located thereon. Title 12, Section 177, Code of Alabama 1940.

I also answer your second question in the affirmative. Though this particular question has not previously been answered by this office, we have previously ruled that rental from road machinery should go to the fund from which purchased. See Biennial Report of Attorney General 1936-1938, page 677 (Quarterly Report of Attorney General, Volume 11, page 153). This opinion has been upheld many times in recent years in informal and official opinions. See, for example, rental of road machinery purchased with gasoline tax funds. Quarterly Report of Attorney

General, Volume 78, page 48(51). It is, therefore, my opinion that proceeds from the sale of lands would revert to the fund from which purchased. Therefore, your second question is answered in the affirmative.

Very truly yours,

MACDONALD GALLION
Attorney General

July 24, 1961

Honorable Alvin T. Prestwood

Commissioner

Department of Pensions and Security

Montgomery, Alabama

Pensions and Security, Department of — Counties.

Counties may appropriate funds for the poor and needy of the county. In the event any part of said funds so appropriated are used for the purpose of reimbursing members of its County Board of Pensions and Security for their traveling and other expenses actually paid out while in attendance at the meetings of the County Board, such expenditures must be approved by the State Department of Pensions and Security.

Opinion by Assistant Attorney General Brogden.

Dear Mr. Prestwood:

Your request for an official opinion bearing date of June 26, 1961, is as follows:

"I request an official opinion as to whether a county may appropriate funds for the purpose of reimbursing members of its County Board of Pensions and Security for their traveling and other expenses actually paid out while in attendance at the meetings of the County Board.

"An opinion rendered by you on January 12, 1960, (Quarterly Report of Attorney General, Volume 98, page 9) holds that a County Commission cannot 'appropriate a sum of money to the local (county) Pensions and Security Board for the purpose of attending meetings, **both on local and state level,** and to cover traveling expenses in conjunction with board investigations.' "

Under the provisions of Act No. 703, Acts of 1951, page 1211, it is provided that the county governing bodies of the several counties may make appropriations to the county departments for the purposes there set out. These include appropriations for the relief of children under eighteen years of age, appropriations for office space for the county department, the maintenance thereof and supplies. This appropriation may be made jointly with incorporated municipalities of the county. Lastly, the county governing body is authorized to make other and further provisions for the care of the poor and needy of the county. It is provided with reference to these appropriations that their expenditure by the county departments must be approved by the State Department of Pensions and Security.

With reference to the particular appropriation of which you inquire, I feel that it could only be made under the authority vested in the governing body of the county to make other and further provisions for the care of the poor and needy of the county. I do not believe that it could be made to the county department for any one specific purpose, such as defraying the expenses of a certain individual on a particular trip. The Attorney General's opinion of January 12, 1960, (Quarterly Report of Attorney General, Volume 98, page 9) pointed out that an appropriation for a specific purpose of this nature could not be made. Any appropriation so made should be made to the county department for the care of the poor and needy of the county; and, should the county department determine that payment of the expenses of travel incurred by County Board members while in attendance at the meetings of the County Board fall within the purview of the care of the poor and needy of the county, they might authorize an expenditure for such purpose, providing same be approved by the State Department of Pensions and Security.

To answer your question, your county governing body may make an appropriation to your County Department of Pensions and Security for the care of the poor and needy of the county, and expenditures from such appropriation can only be made with the approval of the County and State Departments of Pensions and Security.

The Attorney General's opinion of January 12, 1960, (Quarterly Report of Attorney General, Volume 98, page 9) has been considered and is not in conflict with this opinion.

Very truly yours,

MACDONALD GALLION
Attorney General

August 4, 1961

Honorable Curtis H. Rodgers, Clerk

Circuit Court, Covington County

Andalusia, Alabama

Costs and Fees — Clerks of Circuit Courts — Convicts — Comptroller.

1. Misdemeanor prisoners may no longer be sentenced to the state penitentiary and it is provided by Act No. 60, Acts of 1957, page 100, amending Title 45, Section 72, Code of Alabama 1940, that when the presiding judge sentences a prisoner to the county jail or to hard labor for the county and certifies that such prisoner has been committed to the county jail, costs must be paid, as required by law, the same as if the convict had been delivered to the penitentiary.

2. A misdemeanor prisoner receiving either a sentence to imprisonment in the county jail or to hard labor for the county, when delivered to the county jail becomes, insofar as payment of costs by the State is concerned, constructively a penitentiary prisoner and when his commitment to the county jail under either of such sentences is properly certified to State Authorities by the presiding judge costs should be paid by the State Comptroller in accordance with Title 45, Section 69, Code of Alabama 1940, as amended by Act No. 542, Acts of 1957, page 762.

3. The opinion found in Quarterly Report of Attorney General, Vol. 98, page 20, and all other opinions of this office in conflict herewith are hereby modified or extended to conform to this opinion.

Opinion by Assistant Attorney General Hardin.

Dear Sir:

Your request for an official opinion bearing date of April 12, 1960 is as follows:

"Re: Payment of Circuit Court Costs in Jail Sentence Cases

"There has been considerable confusion in reference to the above captioned matter and I am writing you for a clarification of the same. The District Supervisor of the Department of Examiners of Public Accounts has held that the State of Alabama is liable for

court costs as set out in Act 542, Page 762 of the 1957 Legislature, in cases where the defendant is given jail sentences as additional punishment and/or jail sentences for a specified time for payment of fine as well as jail sentences for specified time for payment of court costs, and the said Field Supervisor received verification of this from the Attorney General's Office by telephone here from my office around the first of this year.

"My office has been mailing bills of cost for all Penitentiary cases, hard labor cases, as well as cases where the defendant was given jail sentences to the State Finance Department for payment pursuant to Act 542, supra, of the 1957 Legislature, but the Finance Department has been returning all jail sentence cost bills calling to my attention a ruling from your office dated February 18, 1960, and also January 25, 1960. I have a copy of an opinion addressed to Hon. John Graves, State Comptroller, Department of Finance, from your office, and I find nothing in this opinion which denies Clerks of the various Circuit Courts payment of costs as set out in Act 542 of the 1957 Legslature. This opinion dated February 18, 1960, deals only with Clerks of the Court WHO ARE NOT Clerks of the Circuit Court, therefore, being governed by this opinion, I feel that the State Finance Department is liable for ALL cost bills sent from this Circuit Court pursuant to Act 542 of the 1957 Legislature.

"It will be greatly appreciated if your office will give me a more thorough clarification of this matter so that I may be governed accordingly hereafter, in handling cost bills in jail sentence cases handed down by the presiding Judge of this Circuit Court.

"I find that the Clerks of the Circuit Court of quite a number of the Counties within the State are confronted with the same problem that I have.

"In the event that your office holds that the State Finance Department is not liable for costs as set out in Act 542 of the 1957 Legislative Session for jail sentence cases, please advise from what fund the Clerks of the Circuit Court and the Sheriff can file legal claims for their fees."

I find attached to your letter a copy of a cost bill which you state has been submitted by you to the State Comptroller for payment but which was returned to you unpaid. I feel that I should comment as to the matters disclosed by this cost bill.

If the copy of such cost bill correctly reflects the action of the trial court, it appears that the defendant therein was sentenced to 3 months in the county jail as additional punishment, to 20 days in the county jail in lieu of payment of a $50.00 fine and to 74 days in the county jail for

payment of cost imposed in the case. This would constitute a jail sentence of 3 months and 94 days. I find several deficiencies in this particular sentence which I feel should be discussed.

Our statutes relating to the matter of sentencing a defendant to hard labor for nonpayment of fine and costs are found in Title 15, Sections 341 and 342, Code of Alabama 1940. The first of these relates to such sentencing for nonpayment of a fine while the latter, Section 342, supra, relates to the sentencing of such defendants for payment of cost due in the case. A study of these statutes, together with opinions of this office and decisions of our Supreme Court relating thereto, seem to establish the following principles. First, if the court sentences the defendant to hard labor for the county in punishment of the offense for which adjudged guilty, the court may sentence such defendant to additional hard labor for the county for payment of cost in the case if same are not presently paid. Secondly, if the court imposes a fine upon the defendant in punishment of the offense for which adjudged guilty, the court may likewise impose a sentence of hard labor on such defendant for payment of cost if same are not presently paid. However, if the court sentences the defendant to imprisonment only in punishment of the offense for which found guilty and no fine is imposed, the court may not, under these circumstances, sentence the defendant to hard labor for the county in payment of the cost in the case. Lastly, and most important, in any event, if a defendant is sentenced for payment of cost in a case, such sentence must be at hard labor for the county and not to imprisonment alone. A defendant may not "work out" the cost due by means of a jail sentence but must be sentenced to hard labor in order to pay such cost through this medium. Supporting the above propositions, I would call your attention to Quarterly Report of Attorney General, Vol. 89, page 10 together with the authority cited therein, particularly **ex parte Hill,** 122 Ala. 114, 26 So. 230; **Hollis v. State,** 123 Ala. 74, 26 So. 231 and **Pounders v. State,** 37 Ala. App. 687, 74 So. 2d 640.

Viewed in the above light, it appears that the sentence in the case you have furnished as an illustration is defective in that the defendant therein was sentenced to 74 days in the county jail in payment of the cost in such case. As I have indicated, a defendant cannot "work out" court cost through the means of a jail sentence but must be sentenced to hard labor in order to work out such cost. In the case of nonpayment of a fine, it is provided by Section 341, supra, that it is discretionary with the court as to whether the defendant shall be imprisoned in the county jail or sentenced to hard labor for the county in order to effectuate payment. However, under Section 342, supra, no such discretion is imposed with respect to the sentencing of a defendant for payment of costs. This sentence must be one of hard labor for the county.

With these observations, I turn to your particular question. As I understand your inquiry, you wish to know if you may file a cost bill

with the State Comptroller and have paid from State funds the costs and fees attaching in a case in which the defendant receives a jail sentence rather than a sentence of hard labor for the county. You indicate that over the past several months the State Comptroller has been returning such cost bills to you unpaid.

To answer such question, I feel that we must consider several acts passed by the 1957 Legislature. During this session, legislation was enacted whereby misdemeanor prisoners could no longer be delivered to the state penitentiary. This same legislation also vested in trial courts a discretion as to the place of confinement of felons receiving a sentence of more than one year but not more than two years. In this latter case, the trial court could sentence the defendant either to imprisonment in the penitentiary, to confinement in the county jail, or to hard labor for the county, all at his discretion.

In enacting its legislative program relative to these misdemeanor prisoners and short term felons, the legislature passed Acts No. 60 and 61, found on pages 100 and 101 respectively of the Acts of 1957. These were companion acts passed and approved simultaneously. Act No. 61, supra, amends Title 15, Section 325 of the Code of Alabama 1940, setting out the legal punishments which may be imposed and making specific provision that no misdemeanor prisoner may be sentenced to the penitentiary. As you are aware, this effected a substantial change in the place of confinement of short term prisoners who, prior to this time, had, with few exceptions, been confined in the state penitentiary. Recognizing the effect brought about by this change in place of confinement of these prisoners, the legislature, at the same time, through the means of Act No. 60, supra, amended Title 45, Section 72 of the Code of Alabama 1940 relating to the payment of cost by the State in criminal cases.

This amendatory act permitted the payment of such cost upon the delivery of these prisoners to the county jail, rather than to the penitentiary, and added this provisio, which I deem material and pertinent to your inquiry:

> "Provided, however, that when the presiding judge sentences a prisoner **to the county jail or to hard labor for the county,** and certifies to the board of corrections that the prisoner has been committed to the county jail, costs must be paid, as required by law, the same as if the convict had been delivered to the penitentiary." (Emphasis supplied)

It appears to me that the above quoted provisio is legislative recognition of several facts. First, I feel that such provisio recognizes the distinction between the sentencing of a prisoner to the county jail and the sentencing of a prisoner to hard labor for the county. Secondly, I believe that such provisio is legislative recognition of the fact that all of the

short term prisoners above menitoned will now be confined in the county jail rather than the penitentiary, and lastly, such provisio requires that when such prisoners are confined in the county jail, under either of the sentences mentioned above, and such fact is certified to the proper state authorities, such prisoner is to be considered, insofar as payment of cost by the state is concerned, as having been delivered to the state penitentiary.

This leads next to a consideration of the provisions of Title 45, Section 69, Code of Alabama 1940, as last amended by Act No. 542, Acts of 1957, page 762. This statute was amended in 1957, not as a part of the legislative program relating to the transfer of short term prisoners to county control, but as one of a series of acts relating to the placing of the clerks of the circuit courts of this State on a system of fixed fees rather than specific fees for specific services. As amended, Section 69, supra, provides for the payment from state sources of costs in those cases in which a defendant is convicted and sentenced to the penitentiary, convicted and sentenced to hard labor, or in which defendant is placed on probation. There follows a listing of items of costs which will be paid by the State in these type cases. As I have pointed out, Act No. 60, supra, amending Title 45, Section 72, supra, has provided that whenever the presiding judge sentences a prisoner to the county jail or to hard labor for the county and certifies this fact to the proper State authorities, costs will be paid the same as if the convict had been delivered to the penitentiary. This being true, a prisoner receiving either a sentence to imprisonment in the county jail or to hard labor for the county, when delivered to the county jail becomes, constructively, a penitentiary prisoner and costs in the case should be paid in the manner and amount set out in Title 45, Section 69, as amended, supra.

The opinion found in Quarterly Report of Attorney General, Vol. 98, page 20 and all other opinions of this office in conflict herewith are hereby modified or extended to conform to this opinion.

Very truly yours,

MACDONALD GALLION
Attorney General

August 7, 1961

Honorable F. H. Amberson
Mayor, City of Boaz
Boaz, Alabama

Licenses — Municipalities — Taxes.

An ordinance levying a privilege license, the amount of which is based on gross receipts from the retail sale of tangible

personal property, imposes such license upon a business which is located without the municipality and which sells and delivers merchandise to consumers within such municipality.

Opinion by Assistant Attorney General Gish.

Dear Sir:

Your request for an official opinion, under date of July 18, 1961, is as follows:

"As mayor of the City of Boaz, Alabama, I enclose herewith copy of an ordinance of said city relating to the imposition of a gross receipts tax or license and respectfully request your opinion as to the following:

"Can the city, under said ordinance, legally collect from a dealer in building supplies whose place of business is in Gadsden, Alabama, and who has no place of business in Boaz, where the said dealer, at his place of business in Gadsden, takes an order for building supplies from a resident of Boaz and later delivers to the said resident of Boaz the said order in the dealers own delivery truck?"

I assume that the sale to which your request refers is a retail sale within the meaning of the ordinance of the City of Boaz attached to your request.

Said ordinance levies, in addition to all other taxes imposed by law, a license tax for the privilege of carrying on business activities within the City of Boaz and the police jurisdiction thereof. The amount of such tax is based upon gross receipts from the sale at retail of any tangible personal property except that specifically exempted by Section 3 of said ordinance.

Said Section 3, does not exempt the retail sale of building supplies from the operation of said ordinance.

In the case of **Sanford Service Company v. City of Andalusia,** 256 Ala. 507, 55 So. 2d 856, the Supreme Court of Alabama had before it a problem similar to the one here considered. There the Court held that a sale is not complete until delivery of the merchandise is made and that delivery of such merchandise is an integral part of the sale of same.

This office held, in an opinion rendered to Honorable Arnold Teks, City Attorney, City of Florence, under date of March 3, 1960, that an ordinance of the City of Florence, similar to the one here considered, imposes a license tax upon a firm, located in the City of Birmingham,

which sells caskets to an insurance company and delivers them to an undertaker located in the City of Florence.

Therefore, under the facts submitted, a retail sale is completed within the City of Boaz when the building supplies are delivered to the consumer in said City. For this reason a taxable event occurs within the City of Boaz, under the ordinance here considered, when such delivery is made. Cf. **Graves v. State**, 258 Ala. 359, 62 So. 2d 446.

Hence your question is answered in the affirmative.

Very truly yours,

MACDONALD GALLION
Attorney General

August 14, 1961

Honorable V. R. Jansen

Judge of Probate

Mobile County

P. O. Box 7

Mobile, Alabama

Probate Court — State Land Commissioner — Taxation — Tax Sales.

1. Assignment of certificate of purchase under Title 51, Section 270, Code of Alabama 1940, by State Land Commissioner invalid if occurring after redemption.

2. Assignee under invalid assignment of certificate of purchase by State Land Commissioner may present claim under provisions of Title 51, Section 297, Code of Alabama 1940.

3. Assignee of valid assignment of certificate of purchase by Land Commissioner entitled to redemption money under Title 51, Section 305, Code of Alabama 1940, if notice of assignment given prior to redemption.

4. Assignee of certificate of purchase under duty to reassess and change name of assessment of such property under Title 51, Section 270, Code of Alabama, 1940.

Opinion by Assistant Attorney General Webb.

Dear Judge Jansen:

I have received your request for my opinion, dated June 19, 1961, concerning assignments made by the State Land Commissioner of certificates of purchase under the provisions of Title 51, Section 270, Code of Alabama 1940. The particular facts you state to be are as follows:

"On December 5, 1960 we received State warrant #242400 chargeable to #578, payable to the Judge of Probate of Mobile County, drawn on the State Tresaurer in the amount of $267.21. Enclosed with this warrant were reports to the State Comptroller by Harry H. Haden, Land Commissioner of Alabama, of the sales of certificates of purchase on November 9, 1960 to Win-Key Specialties of a great many 1960 tax sales. The first one of property of Chester F. Ely had been redeemed on December 5, 1960. The second one of property of Jim Gray had been redeemed on the 19th of October and included in the redemption report for that month. The third one had been redeemed on the 21st day of October and included in the redemption report for that month. The fourth one had been redeemed on the 19th of October and included in the redemption report for that month. The fifth one had been redeemed on 31st of October and included in the redemption report for that month."

Your questions stated on such facts are:

"1. Must the judge of probate accept warrants from the State of Alabama issued at the request of the State Department of Revenue for sales of tax certificates made after redemption certificates have been issued covering these sales?

"2. If the judge of probate must accept warrants for the county's, local municipalities and school board's share in the sale of these certificates after redemption distribution, please define the duties on the judge of probate in connection with distribution of the funds contained in the warrant to the various county agencies.

"3 If the Judge of Probate must accept warrants described above, what responsibility does the judge of probate have to the purchasers of these certificates for refund?

"4. If the judge of probate must accept these warrants, should demand be made on those agencies to whom distribution has been made on redemption or should the purchasers of the tax certificates make application for refund."

In my opinion, your questions may not be answered categorically yes or no but depend on the particular facts in your case. As I understand these facts, the first property to be redeemed, that of one Chester F. Ely, was redeemed on December 5, 1960 and the certificate of purchase was assigned by the State Land Commissioner on November 9, 1960, whereas the second, third, fourth and fifth redemptions occurred during the month of October 1960 prior to the assignment of the certificate of purchase by the State Land Commissioner on November 9, 1960.

As to the assignments made by the Land Commissioner after redemption by the property owners, it is my opinion that such assignments were invalid, in view of the fact that no taxes were due at the time of said assignments and the State, therefore, had no interest in the property. However, I am further of the opinion that the provisions for refund set out in Section 297 of Title 51, Code of Alabama 1940, are sufficiently broad to include assignments made by the State as well as sales made by the State. It is, therefore, my opinion that you may distribute the funds received from the Comptroller for those assignments and the refunds should be handled under the provisions of Section 297 of Title 51, supra, and subsequent sections just as if the land had been sold by the State at private sale.

As to the property belonging to Chester Ely redeemed on December 5, 1960, it appears to me that this was a legitimate assignment by the State Land Commissioner in that it occurred on November 9, 1960 prior to said redemption and the redemption, therefore, should have been conducted in accordance with Title 51, Section 305, Code of Alabama 1940. See Biennial Report of Attorney General 1934-36, page 532(534) (Quarterly Report of Attorney General, Volume 2, page 187) cited by you holding that an assignee of a certificate of purchase assigned by the Land Commissioner is in the same position as though he had been the buyer at the tax sale.

In the event that the assignee reassessed the property prior to redemption, in accordance with Section 270 of Title 51, supra, or otherwise notified the Probate Court of the assignment, it is my opinion that you should seek to reimburse him the full amount of the redemption to which he was entitled under Section 305, supra.

I gather from your letter, however, that the Probate Court was not notified of the assignment prior to redemption, nor was the property reassessed in the name of the assignee. In that event, if you have already distributed the proceeds of the redemption made by Mr. Ely, in my opinion you may refund to the assignee of the certificate of purchase the amount of his assignment that was forwarded to you by the State Comptroller. Any additional amount lost by the assignee by virtue of his failure to notify the Probate Court or to reassess in accordance with the provisions of Title 51, Section 270, supra, prior to the redemption, is lost

unless he can show some fault on the part of the State of Alabama or any of its agents, officers, etc., in which case he might seek remedy through the State Board of Adjustment. The duty to notify the Probate Court or reassess the property rests on the assignee by virtue of Section 270, supra, and prior redemption is one of the risks that the assignee takes. See, for example, holding in Quarterly Report of Attorney General, Volume 68, page 9(11), to the effect that a purchaser at a tax sale at common law has no right to refund and the right, if it exists, is purely a matter of legislative grace and governed by express wording of the statutes.

Very truly yours,

MACDONALD GALLION
Attorney General

August 24, 1961

Honorable Hubert McCarley

Sheriff

Marion County

Hamilton, Alabama

Sheriffs — Corrections and Institutions, Dept. of — Costs and Fees — Opinions Overruled, Modified or Distinguished.

1. A sheriff executing a writ of arrest and returning a delinquent parolee, under the authority of Title 42, Sections 10 and 11, is entitled to receive the fees and allowances provided for by Title 11, Section 100, Code of Alabama 1940 (Recompiled 1958), there being a fee for executing the writ of arrest and the fee or allowance provided for the removal of prisoners thereunder.

2. Quarterly Report of Attorney General, Vol. 51, page 254, modified by this opinion.

Opinion by Assistant Attorney General Coe.

Dear Mr. McCarley:

Your request for an official opinion bearing date of July 26, 1961, is as follows:

"Please review opinion under date of June 30, 1948 to Hon. Frank A. Boswell, Director, Department of Corrections and Institutions

found in Volume 51, page 254 of the Attorney General Opinions. In this opinion you state the Department of Corrections and Institutions is not authorized to pay sheriff's mileage for the arrest of parole delinquents under the provisions of Act No. 177, General Acts of 1947.

"Title 42, Section 11, Code of Alabama 1940, Recompiled 1958 states that any parole officer, or any officer authorized to serve criminal process, or any peace officer to whom such warrant shall be delivered is authorized and required to execute such warrant by taking such prisoner and returning him to the prison designated by the department of corrections and institutions. Such officer shall be entitled to receive the **same fees therefor as upon the execution of a warrant of arrest and as for transporting a convict from the place of arrest to the prison.**

"It appears to me that this section of the Code authorizes the Sheriff to charge for transporting a convict from the place of arrest. Please advise me if I can charge 10 cents a mile for executing a warrant of arrest issued under Title 42, Section 10, Code of Alabama 1940, Recompiled 1958."

Title 42, Section 10, Code of Alabama 1940, Recompiled 1958, provides as follows:

"§10. Warrants for the retaking of prisoners.—If the probation and parole officer having charge of a paroled prisoner or any member of the board shall have reasonable cause to believe that such prisoner has lapsed, or is probably about to lapse, into criminal ways or company, or has violated the conditions of his parole in an important respect, such probation and parole officer or any member of the board shall report such fact to the department of corrections and institutions who thereupon shall issue a warrant for the retaking of such prisoner and his return to the prison designated. Any probation and parole officer, police officer, sheriff or other officer with power of arrest upon the request of the probation and parole officer may arrest a parolee without a warrant. In case of an arrest without a warrant the arresting officer shall have a written statement by said probation and parole officer setting forth that the parolee has, in his judgement, violated the conditions of the parole and said statement shall be sufficient warrant for the detention of said parolee in the county jail or other appropriate place of detention, until the warrant issued by the department of corrections and institutions has been received at the place of his detention. Provided further, however, that in no case shall a parolee be held longer than ten (10) days on the order of the probation and parole officer, awaiting the arrival of the warrant as provided for in this section."

The opinion of this office referred to in your inquiry and found in Quarterly Report of Attorney General, Volume 51, page 254, holds that there is no authority for the Department of Corrections to pay said fee. The basis for this holding is that Section 1 of Act No. 177, Acts of Alabama 1947, page 62, approved July 21, 1947, and codified as Title 11, Section 100(6), Code of Alabama 1940, Recompiled 1958, provides that such fee is payable only when the writ of arrest or other process issues from a "court of competent jurisdiction," and that a warrant issued by the Director of the Department of Corrections and Institutions, under the provisions of Section 10, supra, is not a warrant issued from a court of competent jurisdiction.

In my opinion, this conclusion overlooks the provisions of Title 42, Section 11, Code of Alabama 1940, Recompiled 1958, which are as follows:

> "§11. Persons authorized to execute warrants; fees.—Any parole officer, or any officer authorized to serve criminal process, or any peace officer to whom such warrant shall be delivered is authorized and required to execute such warrant by taking such prisoner and returning him to the prison designated by the department of corrections and institutions, there to be held to await the action of the board. Such officer, other than an officer of the prison or probation officer, shall be entitled to receive the same fees therefor as upon the execution of a warrant of arrest at the place where said prisoner shall be retaken, and as for transporting a convict from the place of arrest to the prison, in case such officer also transports said prisoner to the prison. Such fees shall be paid out of the funds standing to the credit of the department of corrections and institutions."

In my opinion, the foregoing code section provides ample authority for the payment of the fees set out in Title 11, Section 100, Code of Alabama 1940, Recompiled 1958, in those cases where the sheriff executes a warrant of arrest issued under Title 42, Section 10, Code of Alabama 1940, Recompiled 1958. You will note that this statute provides a fee of $5.00 for executing a writ of arrest and likewise provides for the payment of the expenses of the sheriff for effecting a removal of a prisoner for any of the causes there set out. In my opinion, a sheriff who is required to return a delinquent parolee to any designated prison is, in effect, "removing" such prisoner and would be entitled, by virtue of Title 42, Section 11, supra, to the removal fee set out in Title 11, Section 100 supra, this being $8.00 per day for himself or his deputy acting in his stead and $8.00 for each guard used in such removal, together with actual necessary traveling expenses for himself, his deputy, guards and prisoners while on the trip. It is further provided that if the trip is made in the personal car of the sheriff, or his deputy, he shall be allowed ten cents per mile in lieu of other transportation expenses. You are therefore advised that, under the circumstances stated in your letter, the sheriff would be en-

titled to the arrest fee and the removal fee or allowance authorized by Title 11, Section 100, supra.

The result of the opinion of this office referred to herein and found in Quarterly Report of Attorney General, Volume 51, page 254, is hereby modified to conform with the conclusion reached herein.

Very truly yours,

MACDONALD GALLION
Attorney General

August 31, 1961

Honorable George A. Toulmin

Commissioner of Licenses

Mobile County

P.O. Box 91

Mobile Alabama

Ad Valorem Taxes — Automobile Dealers — Motor Vehicles.

1. The exemption granted by Subsection (c), Act No. 654, Acts of Alabama 1959, page 1583, for motor vehicles purchased from a dealer's inventories during the tax year, applies only to dealers located in Alabama and the exemption is not granted to motor vehicles purchased from dealers of other states.

Opinion by Assistant Attorney General Webb.

Dear Sir:

Your request for an official opinion bearing date of August 3, 1961, is as follows:

"Reference is here made to an opinion rendered by your office to Honorable Harry H. Haden, Commissioner of Revenue, State of Alabama, on September 8, 1960, but more specifically to the last paragraph on page 29 thereof. See Quarterly Report of the Attorney General of Alabama, Vol. 100, Page 27.

"We quote in part from that portion of such opinion as follows: 'As to the second example, where Richard Rowe buys an automobile

whether new or used in the State of Alabama on March 1, 1961, and immediately thereafter applies for a 1961 license plate he would not be required to furnish a bill of sale or other evidence showing that the automobile purchased was in the dealer's stock of goods or inventories for the tax year 1960 through 1961.... However, as in the first illustration, and in order on October 1, 1961, to secure a 1962 license plate, the said Mr. Rowe would have to furnish to the tax assessor his bill of sale and such other proof as the tax assessor might require, that the car whether new or used was a part of the dealer's inventories for the tax year beginning October 1, 1960, and ending September 30, 1961, or pay ad valorem tax on the car for that tax year.' Emphasis supplied.

"In the absence of any specific provision in Act No. 654, (Acts of Alabama 1959, Volume 2, page 1583,) which further amends Title 51, Sec. 704, Code of Alabama, 1940, as amended, pertaining to exemption from ad valorem taxation of motor vehicles purchased from motor vehicles dealers in other states, and there appearing to be no opinions of the Attorney General, or of the courts of Alabama, dealing directly with the following questions, I would greatly appreciate your opinion on and answer to the same.

"1. Let us assume that a legal resident of Alabama purchased a new or used car direct from a motor vehicle dealer in the State of Michigan, or some state other than Alabama, at some time during the tax year beginning October 1, 1960 and ending September 30, 1961, and brought it into the State of Alabama for licensing for operation on the highways of this State for the balance of such tax year. Let us also assume that on or about October 10, 1961, he requests our office to issue to him a 1962 Alabama motor vehicle license and at that time presents a bona fide bill of sale from the motor vehicle dealer in such other state, together with a claim for exemption and such other proof as may be deemed necessary to show that such motor vehicle was a part of such dealer's stock of goods and inventories for the preceding tax year which began on October 1, 1960 and ends September 30, 1961. Under the foregoing circumstances, can he be legally exempted from payment of ad valorem taxes on such motor vehicle for such preceding tax year?

"2. If such owner is entitled to such exemption, what proof, other than the bona fide bill of sale, should be required of him as a condition precedent to the granting of such exemption when issuing to him his 1962 Alabama license?"

I answer your first question in the negative, thus rendering your second question inapplicable. The theory behind the ad valorem exemptions granted by Act No. 654, Acts of Alabama 1959, page 1583, for new and used automobiles purchased during the tax year, is that the motor

vehicle is a part of the dealer's stock of goods and inventories during the tax year, and, as such, is included by the dealer in his average inventories for ad valorem tax purposes. See Quarterly Report of Attorney General, Volume 98, page 36(39). Thus, the State of Alabama, to prevent double taxation by this state, grants the exemption. If a motor vehicle is purchased new or used from a dealer in another state, the dealer of such other state will not pay ad valorem tax to the State of Alabama on this vehicle.

It is, therefore, my opinion that the exemption granted under subsection (c) of Act No. 654, supra, for motor vehicles purchased from a dealer's inventories during the tax year applies to dealers located in the State of Alabama and the exemption is not granted to motor vehicles purchased from dealers of other states.

Very truly yours,

MACDONALD GALLION
Attorney General

August 31, 1961

Honorable J. Russell Gibson, Jr.

Tax Assessor

Pike County

Troy, Alabama

Ad Valorem Taxes — Motor Vehicles — Opionions Overruled, Modified or Distinguished.

1. Under the provisions of sub-section (c), Act No. 654, Acts of Alabama 1959, page 1583, any automobile brought into the State of Alabama at any time during the tax year beginning October 1, 1960 and ending September 30, 1961 is taxable for the entire tax year, unless purchased from an Alabama dealer's inventory during that tax year.

2. Any automobile coming into the State of Alabama after October 1, 1961 is excluded from the ad valorem tax for the tax year beginning October 1, 1960 and ending September 30, 1961 upon furnishing a certificate of registration in another state after October 1, 1961 together with an affidavit setting out the exact date the automobile was brought into the State of Alabama, or such other evidence such as affidavits and/or testimony of reputable persons satisfactory

to the tax assessor that such automobile did enter the State of Alabama after October 1, 1961.

3. Quarterly Report of Attorney General, Volume 100, page 27, overruled in part and modified to conform with this opinion. Quarterly Report of Attorney General, Volume 98, page 36, modified to conform with this opinion.

Opinion by Assistant Attorneys General Burton and Webb.

Dear Sir:

Your request for an official opinion, bearing date of August 11, 1961, is as follows:

> "On and after October 1, 1961, I will assess motor vehicles in accordance with Title 51, Section 704, as amended by Act #654, Acts of 1959. The assessment will be made on or after October 1, 1961, for the tax year beginning October 1, 1960, and ending at midnight September 30, 1961.
>
> "Please further clarify the two opinions heretofore written regarding Act #654 by answering the following questions:
>
> "1. Do the words 'after the preceding October' as used in subsection (c) of said Section mean on or after October 1st immediately preceding the time the vehicle is being assessed, which this year will be October 1, 1961?
>
> 2. If your answer is in the affirmative, am I to assess all motor vehicles coming into the State between October 1, 1960, and September 30, 1961, inclusive, for the entire year, except those motor vehicles, new or used, which passed through an Alabama dealer's inventories during such tax year?"

I answer both of your questions in the affirmative. In an opinion to Honorable Harry Haden, Commissioner of Revenue for the State of Alabama, reported in Quarterly Report of Attorney General, Volume 100, page 27, it was held, in part (page 29):

> ". . . However on October 1, 1961 in order to secure his license plates for the 1962 year the said Mr. Rowe would have to pay taxes for the tax year beginning October 1, 1960 and ending September 30, 1961 unless he can produce a certificate showing registration in another state after October 1, 1960. . . ."

This holding was in error and that portion above-quoted is, accordingly, overruled and modified to conform with this opinion.

The purpose of Act No. 654, Acts of Alabama 1959, page 1583, by its express wording, is to provide that motor vehicles brought into the State of Alabama at any time during the tax year October 1, 1960 through September 30, 1961 shall be subject to taxation the same as if they had been held or owned in Alabama on the law day and there is no exclusion from this tax other than for automobiles purchased from an Alabama dealer's inventory during the tax year. Quarterly Report of Attorney General, Volume 98, page 36, is also modified to conform with this opinion.

The mention of the words "after the preceding October" quoted by you from subsection (c) of Act No. 654, supra, in my opinion, means on or after October 1 immediately preceding the time the vehicle is being assessed which, in this instance, will be October 1, 1961. The certificate and affidavit required by subsection (c), supra, is merely evidence to prove that such vehicle was brought into the State of Alabama after the end of the tax year.

With respect to your specific inquiry, the law has set up a presumption that every motor vehicle for which a 1962 Alabama license plate is to be purched was present in the State of Alabama during the tax year beginning October 1, 1960 and ending September 30, 1961. The statute provides, however, that the applicant may rebut this presumption by showing that the motor vehicle was registered in another state on or after October 1, 1961, together with an affidavit stating the exact date that the motor vehicle was brought into the State of Alabama.

Though Act. No. 654, supra, does not state other methods of overcoming or rebutting the presumption above created, it is my opinion that the applicant, in the event that he cannot furnish the certificate that his automobile was registered in another state on or after October 1, 1961, may also prove that his automobile was not in this state during the tax year beginning October 1, 1960 and ending September 30, 1961 by other evidence such as affidavits or testimony by reputable persons satisfactory to the tax assessor. To hold otherwise would be to hold that the presumption of presence is conclusive since not all states register automobiles at the same time. Such a holding would be unconstitutional. **State v. Thomas,** 144 Ala. 77, 40 So. 271. American Jurisprudence Evidence, Sections 8, 9, and 10.

Therefore, as stated above, it is my opinion that any automobile brought into the State of Alabama at any time during the tax year beginning October 1, 1960 and ending September 30, 1961 is taxable for the entire tax year unless, of course, the same was purchased from an Alabama dealer's inventory during this tax year.

It is further my opinion that any motor vehicle brought into the State of Alabama on or after October 1, 1961 is excluded from the tax for the tax year beginning October 1, 1960 and ending September 30, 1961 where the person, firm, association, or corporation assessing the motor vehicle furnishes the tax assessor with a certificate of registration in another state on or after October 1, 1961, together with an affidavit setting out the exact date the automobile was brought into the State of Alabama or furnishes such other evidence such as affidavits and/or testimony of reputable persons satisfactory to the tax assessor that such automobile did enter the State of Alabama on or after October 1, 1961 and, therefore, was not in the State of Alabama during the tax year beginning October 1, 1960 and ending September 30, 1961.

The opinions reported in Quarterly Reports of the Attorney General Vol. 100, page 27 and Vol. 98, page 36 are overruled in part insofar as they conflict with this opinion and are modified to conform with this opinion.

Very truly yours,

MACDONALD GALLION
Attorney General

September 12, 1961

Honorable Ira H. Weissinger

Judge of Probate

Lee County Court House

Opelika, Alabama

Filing Tax — Opinions Overruled, Modified or Distinguished.

1. Deed from husband and wife as joint tenants with right of survivorship to same husband and wife as tenants in common subject of deed tax.

2. So much of opinion contained in Quarterly Report of the Attorney General, Volume 95, page 9, as conflicts with opinion expressed herein overruled.

Opinion by Assistant Attorney General Loeb.

Dear Sir:

Your request for an official opinion bearing date of July 21, 1961, is as follows:

"Over a period of several years, husband and wife have purchased property, as joint tenants with right of survivorship. They now desire to convey this property to themselves as tenants in common, without survivorship among themselves. There is actually no change of ownership in the property, but merely a change in the method of holding title, and there is no consideration, other than nominal, for such change.

"The question is whether or not the parties will be required to pay State of Alabama Deed Tax on the value of the property described in the deed from husband and wife, as joint tenants, with right of survivorship, to husband and wife, as tenants in common."

You inquire whether deed tax levied by Section 618, as amended Title 51, Code of Alabama 1940, is due upon a conveyance from a husband and wife as joint tenants with right of survivorship to the same husband and wife as tenants in common. While it is true that the same parties will own the land after conveyance as did before conveyance, and while it is also true that in such cases the consideration for such deeds is often only nominal, it is the opinion of this office that such deed does not fall within the exception contained in Section 618, supra, dealing with deeds for nominal consideration to perfect title. This view is based primarily upon the language used in **Hawkins v. Pure Oil Company**, 232 Ala. 660, 169, So. 307, in which Judge Gardner stated in his concurring opinion:

"Petitioner argues, therefore, that as it already had the legal title, the deed tendered for record was based upon a mere nominal consideration, and for the perfection of its title, within the language of the exception contained in section 21½, which, so far as here pertinent reads:

" 'Except *** deeds or instruments executed for a nominal consideration for the purpose of perfecting the title to real estate.'

"If, of course, the deed is for the purpose of acquiring the title, even though on a nominal consideration, the exception would not be applicable, as illustrated in the opinion of the Attorney General referring to a deed executed by an executor to carry out the will of the testator, and by which deed the legal title passes to the devisee. See Biennial Report of the Attorney General 1926-28, p. 42.

* * * * *

"It (Petitioner) has, according to its own contention, the perfect legal title to all of the property of the Wofford Oil Company of every character and description. This title needs no perfection. **The plain purpose of its recordation, therefore, is not for perfection of the title to real estate, as the exception reads, but the perfection of the record of the transaction. But for that privilege the statute exacts a tax, and**

the exception was not incorporated in the statute for the purpose of enabling one who has the legal title to thus gain the advantage of its recordation without its payment." (Emphasis added)

This opinion is further supported by Quarterly Report of the Attorney General, Volume 84, page 11, and Quarterly Report of the Attorney General, Volume 58, page 126.

So much of the opinion contained in Quarterly Report of the Attorey General, Volume 95, page 9, as conflicts with the opinion expressed herein is hereby overruled.

Very truly yours,

MACDONALD GALLION
Attorney General

September 18, 1961

Honorable Holt A. McDowell

Sheriff of Jefferson County

Court House

Birmingham 3, Alabama

Costs and Fees — Executions — Judgments — Sheriffs

1. Under the provisions of Title 51, Section 903, Code of Alabama 1940, Recompiled 1958, the sheriff should pay over to the Tax Collector the net proceeds of the sale of any property sold in the manner there mentioned upon which there is a lien for taxes, after first deducting the costs and necessary expenses incident to such sale.

2. The plaintiff in judgment would not be liable for court costs if levy is made and property is seized and sold.

3. Attorney fees attaching as a result of such proceeding may not be paid until tax lien is satisfied as this is a lien superior to the attorney's lien.

Opinion by Assistant Attorney General Hardin.

Dear Sir:

Your request for an official opinion bearing date of August 28, 1961, is as follows:

"This office recently received a routine execution from Hon. Julian Swift, Clerk of the Circuit Court of Jefferson County, Alabama.

"Personal property belonging to the defendant in execution was levied on and sold at public auction for an amount less than the judgment and costs.

"Meanwhile, the Tax Collector had advised this office of a tax liability of the defendant, and pursuant to Title 51, Section 903, Code of Alabama, Recompiled 1958, the full proceeds of sale of personal property under execution were turned over to the Tax Collector.

"A literal interpretation of the above cited Code Section, as followed in this and previous instances, has brought about a number of questions as to which I should like your opinion:

"1. Are Circuit Court costs deductable before remittance is made to the Tax Collector of monies recovered on amounts less than the judgment and costs?

"2. Are fees of the Sheriff deductable under the circumstances?

"3. Is the plaintiff in the cause in this instance liable for court costs and sheriff's fees?

"4. If the property seized and sold is stored in a warehouse, are warehouse costs deductible?

"5. Irrespective of Title 46, Section 64, paragraph 2, is the attorney who, in many instances, has aided in the levying of property without remedy for his fee out of the proceeds?"

Title 51, Section 903, Code of Alabama 1940, Recompiled 1958, referred to by you in your request for opinion, is as follows:

"When any sheriff or other officer shall sell any property under execution or other process, or under any decree, judgment, or order of any court, it shall be his duty to ascertain what taxes are a lien upon such property and upon a sale thereof, to first apply the proceeds of such sale to the payment of such taxes."

Proper answer to the inquiries presented by you require a construction of this statute, particularly as to the meaning of the term "proceeds" as there used, and whether certain items of cost and necessary expenses incident to the sale should be deducted before you distribute such proceeds. You advise that in the past you have delivered the full proceeds of such sale to the Tax Collector when a lien for taxes against such property existed which was greater than the amount collected by the execution.

From my study and consideration of the statutes pertinent to your inquiry, I am of the opinion that the proceeds of sale referred to in Section 903, supra, are the "net proceeds" of such sale remaining after the payment of the costs and necessary expenses directly related to the sale. I arrive at such conclusion by reason of the meaning and intent apparent to me from a study of the statutory law relating to executions and judgments, and particularly those statutes found in Title 7, Section 506-561, Code of Alabama 1940, Recompiled 1958. Although these statutes contain no specific provision as to the procedure to be followed in the particular circumstances set out by your letter, it is my opinion that consideration of same in their entirety clearly indicate that the proceeds of the sales there authorized to be distributed are the net proceeds remaining after payment of those costs and necessary expenses directly incident to the sale such as the fee for issuance of execution by the clerk, levy and sale by the sheriff and any necessary expenses of storage or preservation of property associated therewith. Those costs of the suit which resulted in the judgment which are not incidental to the sale of such property are not properly deductible from the proceeds of such sale as they bear no relation thereto. Viewed in this light, I am of the opinion that, subject to the conditions stated, your first inquiry is answered in the affirmative but only the costs accruing in the circuit court which are incidental to such sale should be deducted from the proceeds of the sale prior to the remittance of same to the Tax Collector. As regards the fees of the sheriff in this proceeding, I would point out that, in my opinion, such fees constitute a portion of the costs of the proceeding and, hence, those fees of the sheriff relating to the sale should be deducted along with other costs prior to remitting such proceeds to the Tax Collector. See in this regard **Barron, Administrator v. Tart,** 18 Ala. 668. See also Quarterly Report of Attorney General, Vol. 23, page 250. Accordingly, your second inquiry is likewise answered in the affirmative.

In my opinion, the plaintiff in this proceeding would not be liable for the costs incurred, including the sheriff's fees. It is provided by Title 7, Section 518, supra, that:

> "When execution against the defendant is returned 'no property found,' execution may issue against the plaintiff, in the name of the clerk or the register of the court, for all the costs created by him in obtaining his judgment."

You will note that under this statute execution may issue against the plaintiff only in the event the execution against the defendant is returned "no property found." Such was not the case in the present instance as levy was made on the property of the defendant and certain properties were sold and the proceeds of such sale are on hand. In my judgment, costs, as outlined, should be collected from the proceeds realized from the sale and the plaintiff would not be liable for same.

In my opinion, your fourth inquiry should be answered in the affirmative. In my judgment, if the property seized and sold is required to be stored for a period of time prior to sale, this would constitute a necessary expense incident to the sale which should be paid from the proceeds realized and payment of such expense should be made prior to delivering the net proceeds remaining over to the Tax Collector.

In my opinion, under the circumstances set out by your inquiry, the attorney involved would not be able to collect his fee out of the proceeds of the sale resulting from the levy. It is provided by Title 46, Section 64, subsection 2, that upon suits, judgments, and decrees for money ,attorneys shall have a lien superior to all liens except tax liens. As I understand the instant case, the net proceeds of the sale here concerned will be insufficient to satisfy the tax lien existing upon such property in its full amount. This being true, I do not believe that there would be any monies available for the payment of the fees of the attorney until this tax lien is satisfied in full as it is evident that Section 64, supra, makes the lien for taxes a lien superior to that of the attorney for his fees.

I trust that the above gives answer to the inquiries you have in this regard.

Very truly yours,

MACDONALD GALLION
Attorney General

September 20, 1961

Honorable Handy Ellis

Judge of the Shelby County Law and Equity Court

Columbiana, Alabama

Constables — Arrests.

Under the authority of Title 54, Section 32, and Title 15, Section 152, Code of Alabama 1940, Recompiled 1958, a Constable may make an arrest for a public offence committed in his presence in any part of his county, whether or not the arrest is made within the precinct in which the Constable holds office.

Opinion by Assistant Attorney General Bookout.

Dear Sir:

Your request for an official opinion bearing date of August 15, 1961, is as follows:

> "When a Constable makes an arrest without a Warrant for a public offense committed in his presence in a Beat other than his residence, is he acting in his official capacity or the capacity of a private citizen. If in making the arrest he is acting as a private citizen, is he governed by the provisions of Section 160 Title 15 of the Code of Alabama, as to carrying the prisoner before a Magistrate or delivering him to one of the officers named in Section 152, Title 15 of the Code of Alabama, as specified in Section 160 of Title 15."

It is my opinion that a Constable may make an arrest for a public offense committed in his presence in any part of his county whether or not such arrest is made within the precinct in which the Constable holds office. See the case of **Boswell v. State**, 31 Ala. App. 518, 19 So. 2d 94.

Title 54, Section 32, Code of Alabama 1940, states:

"Every constable is a conservator of the peace within his county."

Also, Title 15, Section 152, is as follows:

> "An arrest may be made, under a warrant, or without a warrant, by any sheriff, or other officer acting as sheriff, or his deputy, or by any constable, acting within their respective counties, or by any marshal, deputy marshal, or policeman of any incorporated city or town, within the limits of the county."

It should be noted that neither of the above Code sections limits a Constable to arrests within his precinct, but confers county-wide authority upon him for the purpose of making arrests and conserving the peace. Therefore, the questions pertaining to his authority to arrest as a private citizen outside his precinct are precluded.

This opinion overrules any prior opinion of this office which is inconsistent with the holdings herein pertaining to the arrest jurisdiction of a Constable within his county.

Very truly yours,

MACDONALD GALLION
Attorney General

September 22, 1961

Honorable Sam Drinkard

Tax Assessor, Marengo County

Linden, Alabama

Motor Vehicles — Ad Valorem Tax

Where an ad valorem tax lien has attached on a used automobile not in a dealer's inventory, such lien remains and continues on such automobile until satisfied by payment of the tax due even though such automobile passes through a dealer's inventory during the tax year.

Opinion by Assistant Attorney General Livingston

Dear Sir:

Your request for an official opinion bearing date of September 13, 1961 is as follows:

"Will you please give me an official opinion on one question before October 1, 1961, with reference to used automobiles. For instance, Mr. A of Marengo County owned an automobile he purchased on January 2, 1960. He comes into Marengo County's Tax Assessor's office to assess said auto between October 1, 1960 and November 15, 1960, at which time he pays taxes on said auto. In February Mr. A trades said auto to a Marengo County, Alabama, auto dealer for a new car, the next day said auto dealer trades the said auto that Mr. A formerly owned and paid taxes on October 1, 1960, thru November 15, 1960, to a Marengo County man, Mr. B. Said auto remains in the county until October 1, 1961 and Mr. B comes in to assess said automobile. Do you rule that I am not supposed to charge taxes on said auto sold Mr. B for assessing period beginning October 1, 1961 and ending November 15, 1961, just because said automobile passed through an Alabama dealer, when the dealer had made his assessment before trading for Mr. A's automobile and will make an affidavit that he has not paid taxes on said automobile, and I as Tax Assessor of Marengo County can swear that no taxes has been paid on said automobile for assessing period beginning October 1, 1961, to November 15, 1961.

"If your answer is in the affirmative, please cite me the law with reference to same because at this time I am at a complete loss as to this ruling or opinion. Just want to know why I'm doing this when I do not understand same as being the law.

"Please give this matter your attention, if possible, before October 1, 1961."

As I understand your question, Mr. A owned an automobile on October 1, 1960. In February 1961, Mr. A traded this automobile to a dealer for a new car. The day after the trade, the dealer sold the used car to Mr. B. You inquire as to whether Mr. B will owe ad valorem tax on said used car for the tax year October 1, 1960 through September 30, 1961 when he assesses it on or after October 1, 1961.

It is my opinion that under the facts as stated, ad valorem tax would be due on such used car for the tax year October 1, 1960 through September 30, 1961.

Title 51, Section 704, Code of Alabama 1940, Recompiled 1958, as amended by Act No. 654, General Acts 1959, page 1585, provides in part as follows:

" . . . Nothing herein shall be construed as affecting the assessment of the stock of goods, wares and merchandise of motor vehicle dealers, or the inclusion of motor vehicles or capital invested therein in making such assessments; nor shall the provisions hereon be contrued as imposing an ad valorem tax upon a motor vehicle for the tax year preceding the tax year in which application for such motor vehicle license is made, **unless such motor vehicle was subject to such assessment, otherwise than as constituting a part of the stock of goods, wares and merchandise of a dealer.**" [Emphasis supplied]

It is my interpretation of the underscored portion of the above statute that where an ad valorem tax lien has attached on a used automobile, not in a dealer's inventory, such lien remains and continues on such automobile until satisfied by payment of the tax due, even though such automobile passes through a dealer's inventory during the tax year. Of course, a new automobile purchased from an Alabama dealer during the tax year is not subject to ad valorem tax the following October 1 since such automobile is not subject to assessment otherwise than as constituting a part of the stock of goods, wares, and merchandise of the dealer. See Section 704(c), supra.

Under the facts stated in your inquiry, a tax lien attached on October 1, 1960 to the automobile owned by Mr. A on that date, and this lien continues on such automobile even though the car was traded to an automobile dealer in February 1961 and later sold to Mr. B by the dealer. The fact that the car did become a part of the dealer's inventory in February 1961 and was later purchased by Mr. B from said dealer does not extinguish the lien which attached on October 1, 1960. The particular automobile was subject to assessment otherwise than as constituting a part of the stock of goods, wares, and merchandise of the dealer. It, therefore,

follows that ad valorem tax is due by Mr. B when he assesses the car on or after October 1, 1961. See Quarterly Report of the Attorney General, Volume 55, page 144.

There is language in former opinions of this office which lead to a conclusion contrary to the result reached in this opinion; however, it should be pointed out that none of these former opinions are in response to the specific question presented in your request. Be that as it may, the conclusion stated herein is, in my opinion, a correct interpretation of the above statute. Therefore, the following opinions and any others, insofar as they conflict with the conclusion stated herein, are modified accordingly: Quarterly Report of Attorney General, Volume 98, page 36; Opinion to Honorable Harry H. Haden, Commissioner of Revenue, dated September 8, 1960; Opinion to Honorable George A. Toulmin, Commissioner of Licenses, Mobile County, dated August 31, 1961; and Opinion to Honorable J. Russell Gibson, Jr., Tax Assessor, Pike County, dated August 31, 1961.

Yours very truly,

MACDONALD GALLION
Attorney General

September 27, 1961

Honorable John A. Sankey

Judge of Probate

Montgomery County

P. O. Box 223

Montgomery 1, Alabama

Taxation — Filing Tax — Mortgages

1. The true test as to when a motgage is a purchase money mortgage is not whether it is executed to the vendor, but whether the proceeds are to be used to apply on the purchase price.

2. In the case of a purchase money mortgage transaction when the mortgage is recorded along with the deed and mortgage tax is paid upon said mortgage, deed tax is due only on the value of the property in excess of the indebtedness secured by said mortgage.

Opinion by Assistant Attorney General Loeb

Dear Sir:

Your request for an official opinion bearing date of September 8, 1961, is as follows:

"We wish you would please give us your opinion, based on the Alabama law, regarding the collection of deed tax in the following situation:

" 'A' deeds a parcel of property to 'B.' 'B,' at the same time, executes a mortgage to 'C,' the proceeds of which mortgage are used to apply on the purchase price of said property. Is this deed subject to State Deed Tax on the full amount of the value of the property, or in the amount above the mortgage?"

Although it is not specifically so stated in your request, it will be assumed for the purposes of this opinion that both the deed and the mortgage are being presented simultaneously for recordation and also that mortgage tax upon the full amount of indebtedness recited in said mortgage has been paid.

Based upon these assumptions, it is my opinion that the deed tax should be measured only by that value of the property in excess of the amount of the indebtedness secured by the mortgage. This opinion is based in part upon the express language contained in Section 618, as amended, Title 51, Code of Alabama 1940, which is as follows:

"Provided that only the value in excess of any mortgages or vendors lien upon any property within this state on which the mortgage tax has been paid, shall be taxable under this section, . . . "

In addition, it has been held several times by this office that in the case of purchase money mortgages where a part of the consideration for the purchase of land is paid in cash and the balance secured by such a mortgage, mortgage tax should be collected upon the full amount of indebtedness incurred under such mortgage and deed tax, upon the value over and above the mortgage, that is, the vendee's equity. See Quarterly Report of the Attorney General, Vol. 55, page 146; Quarterly Report of the Attorney General, Vol. 34, page 75; Quarterly Report of the Attorney General, Vol. 28, page 82; Quarterly Report of the Attorney General, Vol. 24, page 134. See also an opinion rendered by this office on May 29, 1961, to the Honorable J. Frank Croley, Judge of Probate, DeKalb County, Fort Payne, Alabama.

The fact that the mortgage in this instance is given to a third party who is not the seller does not prevent the mortgage from being termed

a "purchase money mortgage." It has been held that the true test as to when a mortgage is a purchase money mortgage is not whether it is executed to the vendor, but whether the proceeds are to be used on the purchase price. **Wermes v. McCowan,** 286 Ill. App. 381, 3 N.E. 2d 720. Or to put it another way, a purchase money mortgage is a mortgage which is given on property sold to secure the balance of the purchase price remaining unpaid and has the same legal effect whether the mortgage is given directly to the vendor or to a third person advancing money. **Gray v. Kappos,** 90 Utah 300, 61 P. 2d 613.

Under the facts presented in your inquiry, the mortgage referred to therein would be a purchase money mortgage and, upon recordation, subject to the full amount of mortgage tax; but the deed conveying the property from the seller to the purchaser would, under the proviso contained in Section 618, supra, be subject to deed tax only upon the value in excess of such purchase money mortgage.

Very truly yours,

MACDONALD GALLION
Attorney General

September 29, 1961

Honorable Robert M. Goodall, Jr.

Mayor, City of Mountain Brook

Post Office Box 9006

Mountain Brook, Alabama

Highways and Highway Department — Municipalities — Roads and Bridges.

A municipality may appropriate funds to help establish and construct a highway located in the county if such highway will benefit the municipality.

Opinion by Assistant Attorney General Gish.

Dear Mr. Goodall:

Your request for an official opinion, dated September 20, 1961, is as follows:

"The City of Mountain Brook has under consideration a request to participate in the construction of a highway project — the so-called Red Mountain Expressway — which would be financed by Federal,

State, and local funds with the latter to consist of contributions by Jefferson County and the cities of Birmingham, Homewood, Vestavia Hills and Mountain Brook.

"In considering this matter, we are confronted by the fact that no part of the proposed expressway will extend through the City of Mountain Brook. This fact has raised a question as to whether or not the City of Mountain Brook may lawfully appropriate funds to help finance a project entirely outside its corporate limits.

"Since the sum of money involved is substantial in terms of our resources, it is the purpose of this letter to ask your opinion in this matter. Does the City of Mountain Brook have authority to appropriate funds from its treasury to pay a portion of the cost of a highway project, no part of which is located within said City, if the governing body of said City determines that the project would result in substantial benefit to said City and the residents thereof? In the event you determine the City has such authority under certain circumstances, but not in all cases, what are the conditions when the City might lawfully do so?

I am informed that the proposed highway, to which your request refers, will be located within the City of Birmingham, the City of Homewood, and an unincorporated area in Jefferson County.

The statutes which authorize and control the establishment and construction of public roads and highways in the counties of this State are codified in Title 23, Chapter 1, Article 3, Code of Alabama 1940.

Title 23, Section 53, Code of Alabama 1940, which is a part of Article 3, supra, reads as follows:

"§53. MUNICIPALITIES MAY AID IN SUCH WORK. — The governing authority of any municipality that would be benefited by the purchase, establishment, construction or maintenance of the bridges, causeways, highways, or ferries, or combination of same, mentioned in this article, may extend aid to the establishment, construction or maintenance of the same."

I am of the opinion that the broad provisions of Section 53, supra, authorize the City of Mountain Brook to appropriate funds to pay a portion of the cost of establishing and constructing the proposed highway, to which your request refers, if the governing body of said City determines that said highway would benefit the municipality.

The opinion expressed herein is strengthened by the fact that the Supreme Court of Alabama held in the case of **Johnson v. City of**

Sheffield, et al, 236 Ala. 411, 183 So. 265, that, in the absence of any specific direction as to the application of specific revenues, a municipality may apply them in any manner not inconsistent with its charter provisions. The use of municipal revenue, except that required for specific purposes, is usually subject alone to the discretion of the local authorities. See also **Fitts v. Commission of City of Birmingham, et al,** 224 Ala. 600, 141 So. 354.

Very truly yours,

MACDONALD GALLION

Attorney General

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